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No. 76-567

In the Supreme Court of the United States

OCTOBER TERM, 1976

WEST PENN POWER COMPANY, PETITIONER

v.

RUSSELL TRAIN, ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 110a-114a) is reported at 538 F. 2d 1020.

JURISDICTION

The judgment of the court of appeals was entered on July 30, 1976 (Pet. App. 115a), and a timely petition for rehearing was denied on September 15, 1976 (Pet. App. 117a). The petition for a writ of certiorari was filed on October 22, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Clean Air Act violates the Due Process Clause of the Fifth Amendment by permitting federal enforcement of a state implementation plan that was not

subject to challenge on grounds of economic and technological infeasibility at the plan approval stage under Section 307 of the Act.

2. Whether the Clean Air Act requires that federal enforcement of a legally adopted state implementation plan be suspended while petitioner challenges the conditions of a variance granted by the State under state administrative review procedures.

STATEMENT

On September 13, 1973, pursuant to Section 113(a) (1) of the Clean Air Act, 84 Stat. 1686, as amended, 42 U.S.C. 1857c-8(a)(1), the Administrator of the Environmental Protection Agency sent petitioner a notice that Boiler No. 33 at petitioner's Mitchell Power Station was in violation of the regulations of the Pennsylvania air quality implementation plan limiting emissions of sulfur dioxide and particulates. Petitioner filed suit in the United States District Court for the Western District of Pennsylvania seeking injunctive and declaratory relief against this notice of violation. Petitioner argued that the Pennsylvania implementation plan should have permitted the use of tall stacks as a method of meeting the sulfur dioxide restrictions in the plan. It also contended that federal enforcement of the Pennsylvania implementation plan should be barred because the Pennsylvania Department of Environmental Resources had granted petitioner a temporary variance.[1]

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[1]On September 19, 1973, the Pennsylvania Department of Environmental Resources granted petitioner a temporary variance, extending the compliance deadline for emission of sulfur compounds from Boiler No. 33 to June 30, 1976, while requiring the installation of flue gas desulfurization equipment (a scrubber) or conversion to low-sulfur fuel. This variance has not been approved by the Environmental Protection Agency, because the variance extended beyond July 31, 1975, the final date for attainment of the primary ambient air quality standard for sulfur oxides (Pet. App. 5a). See 40 C.F.R. 51.15(b)(1); *Train* v. *Natural Resources Defense Council, Inc.*, 421 U.S. 60.

The district court dismissed the action for lack of jurisdiction. The court held that, insofar as petitioner was attacking the Pennsylvania plan, it had waived its right to review in the federal courts by not filing a timely petition to review the Environmental Protection Agency's approval of the plan. The court also held that the variance granted by the State was ineffective to bar federal enforcement of the implementation plan because Section 110(a) (3) of the Act, 84 Stat. 1680, as amended, 42 U.S.C. 1857c-5(a)(3), provides that variances must be submitted by the Governor of the State to, and approved by, the Environmental Protection Agency (Pet. App. 46a-62a).

A divided court of appeals, relying on different grounds, affirmed (Pet. App. 66a-107a). The court concluded that petitioner was not attacking the implementation plan itself, and that review was not affirmatively precluded. On the other hand, the court held that no jurisdictional basis existed for petitioner's suit against issuance of a notice of violation by the Administrator. Petitioner could raise its argument, the court stated, as a defense to any judicial proceedings that the Administrator might commence to obtain compliance with the implementation plan. On June 21, 1976, this Court denied West Penn Power Company's petition for a writ of certiorari (No. 76-567).

On March 20, 1975, prior to the court of appeals' decision, petitioner filed a petition for review of the Pennsylvania implementation plan insofar as it related to control of the emissions of sulfur dioxide at its Mitchell Power Station (Pet. App. 32a-45a). On May 19, 1975, the court of appeals entered a stay of federal enforcement pending its resolution of the issues raised in the petition for review.

On July 30, 1976, the court of appeals dismissed the petition for review on the ground that the action was indistinguishable from *Union Electric Co.* v. *Environmental*

Protection Agency, No. 74-1542, decided June 25, 1976 (Pet. App. 110a-115a). Under the terms of a stipulated order extending the original stay of federal enforcement, the order staying federal enforcement of the Pennsylvania implementation plan expired thirty days after the court of appeals' decision, or on August 30, 1976. On August 12, 1976, petitioner filed with the court of appeals a petition for rehearing *en banc* and request for an extension of a stay of enforcement. On September 15, 1976, the court of appeals denied petitioner's petition for rehearing *en banc* and request for an extension of a stay of enforcement (Pet. App. 117a).

On September 23, 1976, petitioner filed in the court of appeals a motion for stay of mandate and stay of enforcement pending review by this Court. On September 29, 1976, the court of appeals granted the motion for a stay of mandate but denied the request for a stay of enforcement.

On October 12, 1976, petitioner filed with this Court an application for a stay of enforcement pending disposition of petition for writ of certiorari. Mr. Justice Brennan denied the application on October 20, 1976.

ARGUMENT

1. Petitioner contends (Pet. 15-21) that the threat of federal enforcement of the terms of a state implementation plan submitted pursuant to the Clean Air Act, 42 U.S.C. 1857 *et seq.*, violates the Due Process Clause of the Fifth Amendment to the extent that the target source is denied an opportunity to raise claims of economic and technological infeasibility at the plan approval stage under Section 307 of the Act, 84 Stat. 1707, as amended, 42 U.S.C. 1857h-5.

In *Union Electric Co.* v. *Environmental Protection Agency*, No. 74-1542, decided June 25, 1976, this Court held that, under the 1970 Amendments to the Clean Air Act, the EPA Administrator lacked authority to consider claims of

economic and technological infeasibility in reviewing state submitted implementation plans and that such claims were therefore not a proper subject for consideration on judicial review of the Administrator's decision. The Court agreed with the Administrator "that Congress intended claims of economic and technological infeasibility to be wholly foreign to the Administrator's consideration of a state implementation plan" (slip op. 8-9). Noting that the language of the Amendments and the legislative history showed Congress' awareness that some sources of pollutants might have to shut down (*id.* at 10-11), the Court concluded that Congress nevertheless intended to require that primary air quality standards be met.

The Court recognized, however, that claims of economic and technological infeasibility might be raised at other meaningful times. Indeed, the Court stated that "the Amendments do allow claims of technological and economic infeasibility to be raised in situations where consideration of such claims will not substantially interfere with the primary congressional purpose of prompt attainment of the national air quality standards" (*id.* at 18). For example, it would not frustrate the congressional purpose to allow presentation of infeasibility claims when necessary air quality could be achieved by apportioning the control burden in a different manner; in such a case, a source not solely responsible for air pollution in its vicinity could pursue its remedies under State law. Moreover, the Court pointed out in *Union Electric* that sources of pollutants could present their views before the State agency charged with developing the implementation plan, could seek a variance from the State agency for submission to the Administrator as a revision of the implementation plan, and, in some cases, could take their claims to the state courts (*id.* at 18-19).

Claims of economic or technological infeasibility may also be relevant to fashioning the terms of a compliance order

under Section 113(a)(4) of the Clean Air Act or to the scope of relief afforded in a civil suit under Sections 113(b) or 304, 84 Stat. 1706, as amended, 42 U.S.C. 1857h-2. While we do not believe that petitioner would be entitled to raise its infeasibility claim as a defense on the merits in an enforcement proceeding or civil action,[2] we believe that petitioner could present such arguments on the question of remedies for the violation. Thus, petitioner has had, and may again have, opportunities to present its infeasibility claim.

Against this background petitioner's contention that the Due Process Clause requires leave to raise infeasibility claims in a Section 307 proceeding for judicial review is unpersuasive. More than five years ago, petitioner had the opportunity to object at the State level to the provisions of the implementation plan requiring it to meet certain standards for control of sulfur oxide emissions. After approval of the plan by the Administrator, petitioner sought a variance from the appropriate state agency but declined to comply with the conditions of the variance it received. While petitioner complains that a hearing on its appeal of the variance was delayed to its detriment, it does not appear that petitioner attempted to expedite the proceedings by mandamus or other action in state court. Nor has petitioner demonstrated that the other opportunities to raise an infeasibility claim would be inadequate to protect its rights.

To the extent, therefore, that the Clean Air Act permits consideration of infeasibility claims, a Section 307 proceeding is not an appropriate time. The purpose of a proceeding under Section 307 is to review the decision of the Administrator in approving or disapproving a State

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[2]Compare *Friends of the Earth* v. *Potomac Electric Power Co.*, 419 F. Supp. 528 (D. D.C.) with *West Penn Power Co.* v. *Train* (*West Penn I*) (Pet. App. 66a-107a).

implementation plan. Since the Administrator is not authorized to reject a plan because of infeasibility, and since no adverse consequences are visited on polluters by approval of the plan itself, consideration of such claims would not only be pointless but would create additional delays and impediments for a task that Congress clearly wished to be undertaken with dispatch.

2. Petitioner contends that the Court should grant review in order to decide whether a state-granted variance,[3] without federal approval of the variance, is sufficient to suspend federal enforcement of the implementation plan until petitioner exhausts its opportunities under state administrative procedures to challenge the variance at the state level.[4] The Court already has resolved that question adversely to petitioner's position in *Train* v. *Natural Resources Defense Council, Inc.*, 421 U.S. 60, 92:

> [A] polluter is subject to existing requirements until such time as he obtains a variance, and variances are not available under the revision authority until they have been approved by both the State and the Agency. Should either entity determine that granting the variance would prevent attainment or maintenance

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[3]The conditional variance issued by the Commonwealth (with which petitioner has not complied) and the compliance order issued to West Penn Power by EPA are consistent in that each required the company to install a scrubber on its Mitchell Power Station in accordance with substantially similar timetables. Indeed, the Commonwealth's variance is actually a compliance order requiring installation of a scrubber in accordance with a strict timetable. EPA has withdrawn its compliance order because the compliance dates for installation of the necessary pollution control equipment have long since passed.

[4]The court of appeals previously rejected petitioner's argument on this issue in *West Penn I* (Pet. App. 66a), and this Court denied West Penn Power Company's petition for a writ of certiorari in that case. The issue was not directly addressed by the court of appeals in its opinion of July 30, 1976, of which petitioner now seeks review.

> of national air standards, the polluter is presumably within his rights in seeking judicial review. This litigation, however, is carried out on the polluter's time, not the public's, for *during its pendency the original regulations remain in effect, and the polluter's failure to comply may subject him to a variety of enforcement procedures.* [Emphasis added.]

No further review of this issue is warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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